Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues: Good Faith Negotiation and Exclusivity	)	

FIRST REPORT AND ORDER

Adopted: March 14, 2000 **Released: March 16, 2000**

By the Commission:

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I. INTRODUCTION

1. In this First Report and Order ("Order"), we adopt rules implementing certain aspects of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").[1] SHVIA authorizes satellite carriers to add more local and national broadcast programming to their offerings, and to make that programming available to subscribers who previously have been prohibited from receiving broadcast fare via satellite under compulsory licensing provisions of the copyright law. The legislation generally seeks to place satellite carriers on an equal footing with local cable operators when it comes to the availability of broadcast programming, and thus give consumers more and better choices in selecting a multichannel video program distributor ("MVPD").

2. Among other things, Section 325(b)(3)(C) of the Communications Act requires satellite carriers to obtain retransmission consent for the local broadcast signals they carry, requires broadcasters, until 2006, to negotiate in good faith with satellite carriers and other MVPDs with respect to their retransmission of the broadcasters' signals, and prohibits broadcasters from entering into exclusive retransmission consent agreements.[2] Section 325(b)(3)(C) required the Commission to commence a rulemaking within 45 days of the enactment of SHVIA and to complete all actions necessary to prescribe regulations within 1 year after such date of enactment.[3] The Commission issued a Notice of Proposed Rulemaking ("Notice") on December 22, 1999.[4] The Commission received numerous comments and reply comments to the Notice.[5] We conclude the good faith negotiation and exclusivity portion of this rulemaking well ahead of our statutory deadlines for doing so because of the importance of implementing these provisions to MVPD competition and the growth of satellite service.

[1]SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), PL 106-113, 113 Stat. 1501, Appendix I (1999).

[2]47 U.S.C. § 325(b)(3)(C). Retransmission consent is the process whereby television broadcasters negotiate and consent to carriage of their signals by MVPDs such as cable television operators and satellite carriers.

[3]*Id.*

[4]*See Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues,* Notice of Proposed Rulemaking, CS Docket No. 99-363, FCC 99-406 (rel. December 22, 1999) ("Notice"). The Notice also sought comment on the adoption of implementing regulations relating to the retransmission consent election cycle for satellite carriers. We will adopt such election rules in a separate order within the time limit established by Congress.

[5]A list of commenters and reply commenters and the abbreviations by which they are referred to herein is attached as Appendix A.

II. BACKGROUND

3. In 1988, Congress passed the Satellite Home Viewer Act ("1988 SHVA") in order to provide people in unserved areas of the country with access to broadcast programming via satellite.[6] The 1988 SHVA enabled satellite carriers[7] to provide broadcast programming to those satellite subscribers who were unable to obtain broadcast network programming over-the-air. As a general matter, however, the 1988 SHVA did not permit satellite carriers to retransmit local broadcast television signals directly to consumers.

4. The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[8] amended the Communications Act, *inter alia*, to include Section 325, which provides television stations with certain carriage rights on local market cable television systems. Within local market areas,[9] commercial television stations may elect cable carriage under either the retransmission consent or mandatory carriage requirements.[10] Section 325 as initially enacted contained no standards pursuant to which broadcasters were required to negotiate with MVPDs. The Commission established rules related to the retransmission/mandatory carriage election cycle, but did not adopt rules governing the negotiation process of retransmission consent.

5. SHVIA revises the 1988 SHVA and reflects changes not only involving the satellite industry and subscribers, but television broadcast stations and terrestrial MVPDs.[11] SHVIA adopts changes in several areas, including retransmission consent, must-carry, and retransmission of local broadcast signals. In particular, SHVIA addresses several limitations previously placed on satellite carriers, including the issue of satellite carrier retransmission of local broadcast programming.

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[6]Conference Report at 1.

[7]The term "satellite carrier" means "an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission and operates in the Fixed-Satellite Service under part 25 of title 47 of the Code of Federal Regulations or the Direct Broadcast Satellite Service under part 100 of title 47 of the Code of Federal Regulations, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing." 17 U.S.C. § 119(d)(6). Satellite carriers' customers are home satellite dish households.

[8]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[9]*See* 47 C.F.R. §76.55(e) (currently defined as Nielsen's Designated Market Areas ("DMAs")).

[10]*Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues,* Report and Order 8 FCC Rcd 2965 (1993) ("*Broadcast Signal Carriage Order*"). The Commission later clarified these rules. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues,* Order, 8 FCC Rcd 4142 (1993) ("*Clarification Order*").

[11]The Communications Act defines an MVPD as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 602(13).

III. SUMMARY OF DECISION

6. The Order determines that the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission. Instead, the order concludes that Congress intended that the Commission follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement. Consistent with this conclusion, the Order adopts a two-part test for good faith. The first part of the test consists of a brief, objective list of negotiation standards. First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD's offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD.

7. The second part of the good faith test is based on a totality of the circumstances standard. Under this standard, an MVPD may present facts to the Commission which, even though they do not allege a violation of the specific standards enumerated above, given the totality of the circumstances constitute a failure to negotiate in good faith.

8. The Order concludes that it is not practicably possible to discern objective competitive marketplace factors that broadcasters must discover and base any negotiations and offers on, and that it is the retransmission consent negotiations that take place that are the market through which the relative benefits and costs to the broadcaster and MVPD are established. The Order provides examples of negotiation proposals that presumptively are consistent and inconsistent with "competitive marketplace considerations." At the same time, the Order provides that it is implicit in Section 325(b)(3)(C) that any effort to further anti-competitive ends through the negotiation process would not meet the good faith negotiation requirement. Considerations that are designed to frustrate the functioning of a competitive market are not "competitive marketplace considerations." Conduct that is violative of national policies favoring competition -- that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market -- is not within the competitive marketplace considerations standard included in the statute. The Commission's rules regarding the good faith negotiation requirement sunset on January 1, 2006.

9. As for the prohibition on exclusivity, the Order interprets the phrase "engaging in" broadly. Thus, the Order would prohibit not only entering into exclusive retransmission consent agreements, but also negotiating exclusive agreements that would take effect after the sunset of the prohibition. The Commission's rules regarding exclusive retransmission consent agreements sunset on January 1, 2006.

10. An MVPD believing itself to be aggrieved under Section 325(b)(3)(C) may file a complaint with the Commission. The Order provides that the procedural provisions of Section 76.7 will govern good faith and exclusivity complaints. The Order directs Commission staff to expedite resolution of good faith and exclusivity complaints. The Order provides that the burden of proof with regard to such complaints is on the MVPD complainant.

IV. GOOD FAITH NEGOTIATION REQUIREMENT

A. Congressional Intent in Amending Section 325 of the Communications Act

11. In SHVIA, Congress amended Section 325(b) of the Communications Act, requiring the Commission to revise its regulations so that they shall:

> . . . until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.[12]

The Joint Explanatory Statement of the Committee of Conference ("Conference Report") does not explain or clarify the statutory language, merely stating that:

> The regulations would, until January 1, 2006, prohibit a television broadcast station from . . . refusing to negotiate in good faith regarding retransmission consent agreements. A television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The [Commission] may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations.[13]

The Notice sought comment on the correct interpretation of the good faith negotiation requirement of Section 325(b)(3)(C).[14]

12. At the outset of our discussion, we note that Section 325(b)(2)(E) of the Communications Act grants satellite carriers a six-month period during which they may retransmit the signals of local broadcasters without a broadcaster's express retransmission consent.[15] As discussed in further detail below, Section 325 also requires strict enforcement of,

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[12]Communications Act § 325(b)(3)(C), 47 U.S.C. §325(b)(3)(C)(ii).

[13]Conference Report at 13.

[14]Notice at ¶ 15.

[15]Section 325(b)(2)(E) provides that:

> This subsection [prohibiting MVPD retransmission of local broadcast signals without express broadcaster consent] shall not apply . . . during the 6-month period beginning on the date of the enactment of the Satellite Home Viewer Improvement Act of 1999, to the retransmission of the signal of a television broadcast station within the station's local market by a satellite carrier directly to its subscribers under the statutory license of section 122 of title 17, United States Code.

(...continued)

and severe penalties for, satellite carrier retransmission of local broadcast signals without consent after this six-month period expires.[16] We have adopted these rules before the end of the six-month period provided by Section 325(b)(2)(E) so that MVPDs, particularly satellite carriers, and broadcasters understand their rights and obligations under Section 325(b)(3)(C) before that period expires. These rules will provide a framework under which broadcasters and satellite carriers can achieve retransmission consent before the expiration of the six-month period set forth in Section 325(b)(2)(E) so as to avoid the highly undesirable interruption of local broadcast signals that satellite carriers have begun to provide to their subscribers in many cities across the nation. On an ongoing basis, we intend these rules to govern the negotiation of retransmission consent between broadcasters and all MVPDs.[17]

13. The statute does not appear to contemplate an intrusive role for the Commission with regard to retransmission consent. Section 325(b)(3)(C) instructs the Commission to "revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent under this subsection. . . ."[18] The fact that Congress instructed the Commission to "revise" its existing retransmission consent regulations, coupled with the determinedly brief discussion of Section 325(b)(3)(C) in the Conference Report, leads us to conclude that, in addition to the guidance that can be gleaned from SHVIA, we should also look for guidance in the legislative history of the retransmission consent provisions of the 1992 Cable Act.[19] When Congress first applied retransmission consent to MVPDs in 1992, it stated that "it is the Committee's intention to *establish a marketplace* for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to *dictate the outcome of the ensuing marketplace negotiations*."[20]

14. Based on this language, the Commission concluded in the *Broadcast Signal Carriage Order* that Congress did not intend that the Commission should intrude in the negotiation of retransmission consent.[21] We do not interpret the good faith requirement of SHVIA to alter this settled course and require that the Commission assume a substantive role in the negotiation of the terms and conditions of retransmission consent. We note that Congress considered and explicitly rejected a comprehensive regime that required the Commission to:

> prohibit television broadcast stations that provide retransmission consent from engaging in discriminatory practices, understandings,

(...continued from previous page)
47 U.S.C. § 325(b)(2)(E).

[16] 47 U.S.C. § 325(e); *see infra* n.131 and accompanying text (discussing Section 325(e)).

[17] See 47 U.S.C. § 325(b)(1) ("No cable system or other *multichannel video programming distributor* shall retransmit the signal of a broadcasting station"); *Id.* § 325(b)(3)(C) (" . . . if the television broadcast station enters into retransmission consent agreements . . . with different *multichannel video programming distributors* . . .")(emphasis added).

[18] 47 U.S.C. § 325(b)(3)(C).

[19] *See* NAB Comments at 17; ALTV Comments at 15.

[20] *Broadcast Signal Carriage Order*, 8 FCC Rcd at 3006 (emphasis added), quoting 1992 Cable Act Senate Report at 36.

[21] *Id.*

> arrangements, and activities, including exclusive contracts for carriage, that prevent a multichannel video programming distributor from obtaining retransmission consent from such stations.[22]

Where Congress expressly considers and rejects such an approach, the rules of statutory construction do not favor interpreting a subsequent statutory provision to require the rejected alternative.[23] Given the express congressional rejection of this anti-discrimination provision, we will not adopt rules to recreate this provision by regulation.

15. In support of the position that intrusive Commission action is unnecessary to implement the good faith negotiation requirement, commenters point to the fact that thousands of retransmission consent agreements have been successfully concluded between local broadcasters and MVPDs since adoption of the 1992 Cable Act.[24] In addition, commenters note that within days after enactment of SHVIA, DIRECTV and EchoStar announced that they had entered into retransmission consent agreements with the owned-and-operated affiliates of several of the major television networks.[25] As a result, these commenters argue that it would be wholly inappropriate to impose "shotgun wedding" style regulations on a marketplace that is already functioning.[26] DIRECTV, however, argues that the existence of these agreements does not ensure that agreements that have yet to be completed will progress as smoothly.[27]

16. One commenter maintains that the purpose of the good faith requirement is merely to bring the parties to the bargaining table, stating that "Congress signaled its desire only that broadcasters, having once made the decision to provide retransmission consent, should be required to negotiate with all interested MVPDs and not engage in an outright refusal to deal."[28] Several broadcast commenters assert that Congress merely intended the Commission to revise its

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[22]H.R. 1554, 106th Cong., 1st Sess. (1999) (unenacted Section 325(b)(2)(C)(ii)).

[23]*See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling that the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Slaven v. BP America, Inc.*, 973 F.2d 1468, 1474 (9th Cir. 1992) ("Congress's earlier express rejection of certain statutory language counsels strongly against interpreting the statute in a manner consistent with the rejected language."); *see also* Network Affiliates Comments at 3; NBC Comments at 6; Hearst Reply at 2; Post Reply at 2; Time Warner Reply at 10; Fisher Reply at 3.

[24]Pub. L. No. 102-385, 106 Stat. 1460 (1992); *see* Network Affiliate Comments at 9; CBS Comments at 8; Post Reply at 4..

[25]NAB Comments at 15; Disney Comments at 12; Fox Comments at 2; NBC Comments at 4-6; Young Reply at 4.

[26]NAB Comments at 15; Fisher Reply at 3; Network Affiliates Reply at 16 (" There is no factual basis on which the Commission may rationally conclude that the marketplace is dysfunctional. Should it become so, the Commission can then recommend to Congress that it be given statutory authority to establish a substantive regulatory scheme.").

[27]DIRECTV Reply at 7.

[28]Network Affiliate Comments at 16; NCTA Comments at 4; Fisher Reply at 3; Lin Reply at 2; Disney Comments at 5 ("common law teaches that the duty of good faith is violated only when a party to a negotiation engages in a refusal to deal").

existing regulations to account for retransmission consent agreements between broadcasters and satellite carriers that now qualify for compulsory copyright license to provide local television stations to satellite subscribers.[29]

17. ALTV advises the Commission to focus on Congress' overarching purpose in enacting Section 325 in the 1992 Cable Act – assuring broadcasters the opportunity to secure compensation for the value of the retransmission of their signals by MVPDs.[30] Conversely, other commenters assert that Congress intended the Commission to begin with the premise that television broadcast programming is an indispensable component of any MVPD's service package and that alternative MVPDs cannot compete effectively with incumbent cable operators if they are denied full and fair access to that programming in local markets.[31]

18. We find instructive the legislative history of a previous version of SHVIA that was considered, but not enacted, by Congress. During the consideration of the House version of SHVIA, Representative Tauzin explained to Representative Dingell that the House bill, which included a detailed, anti-discrimination provision, would permit:

> [A] broadcast station . . . for example, [to] negotiate a cash payment from one video distributor for retransmission consent and reach an agreement with other distributors operating in the same market that contains different prices or other terms . . . [Indeed], as long as a station does not refuse to deal with any particular distributor, a station's insistence on different terms and conditions in retransmission agreements based on marketplace considerations is not intended to be prohibited by this bill . . . if a station negotiates in good faith with a distributor, the failure to reach an agreement with that distributor would not constitute a discriminatory act that is intended to be barred by this section.[32]

In discussing this same previous version of SHVIA, Representative Berman echoed a similar sentiment stating "[W]hile it is important that MVPDs have the opportunity to negotiate for retransmission consent, we do not in this bill subject the prices or other terms and conditions of nonexclusive retransmission consent agreements to [Commission] scrutiny."[33] Again, these statements reflect consideration of the more onerous House version of SHVIA and its anti-discrimination requirement. We find it difficult to reconcile commenters arguments that SHVIA as enacted contains a broad grant of Commission authority to analyze and prohibit the substantive terms of retransmission consent with these statements.

[29]Network Affiliates Comments at 5; Disney Comments at 1; Hearst Reply at 5; Lin Reply at 2.

[30]ALTV Comments at 4; *see also* Network Affiliates Reply at 17.

[31]BellSouth Reply at 3-4; Seren Reply at 3; RCN Reply at 3; U S West Reply at 4.

[32]145 Cong. Rec. H 2320 (daily ed. April 27, 1999) (colloquy between Representatives Tauzin and Dingell).

[33]*Id.* at H2317 (statement of Representative Berman). Moreover, in discussing the version of Section 325(b)(3)C) actually enacted, Representative Tauzin urged his colleagues to reopen the debate regarding anti-discriminatory retransmission consent at some future time. 145 Cong. Rec. E2487 (daily ed. November 19, 1999) (Representative Tauzin).

19. Commenters argue that the statutory imposition of a good faith negotiation requirement is in derogation of the long-standing common law right to contract and therefore the duty, though statutorily imposed, must be narrowly construed.[34] Commenters assert that even a statutory duty to negotiate in good faith does not require parties to do anything contrary to their own self-interest or make any particular concessions.[35] Accordingly, argues Disney, the Commission is not empowered to become involved in the substance of retransmission consent negotiations.[36]

20. We agree with those commenters that assert that Section 325(b)(3)(C) should be narrowly construed. As commenters indicate, congressional language in derogation of the common law should be interpreted to implement the express directives of Congress and no further. The United States Supreme Court has reiterated this rule of statutory construction on several occasions, holding that [s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."[37] In addition, the Court has stated that, when a statutory provision does derogate from the common law, it "must be strictly construed for no statute is to be construed as altering the common law, farther [sic] than its words import."[38]

21. Commenters state that, in other contexts, the good faith standard has a well understood meaning that Congress must be presumed to have intended, particularly, where, as here, nothing in the statute or the legislative history suggests that Congress intended the Commission to develop its own definition of good faith.[39] These commenters argue that SHVIA cannot be read to grant the Commission new, wholesale authority to define good faith or engage in a detailed case-by-case review of the retransmission terms offered to one MVPD as compared to another.[40] These commenters assert that the most appropriate statutory example to follow is that of the good faith requirement of Section 8(d) of the Taft-Hartley Act.[41]

22. Given the dearth of guidance in the statute and legislative history, we believe that Congress signaled that the good faith negotiation requirement adopted in Section 325(b)(3)(C) was sufficiently well understood that further explication was unnecessary. In such situations, we believe that Congress intends the Commission look to analogous statutory standards from which to draw guidance. While commenters offer various sources on which to rely, we agree with those

[34]Network Affiliates Comments at 12 & Hearst Reply at 6, each quoting *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959) ("*Herd*").

[35]NAB Comments at 9; Disney Comments at 5; ALTV Comments at 14.

[36]Disney Comments at 2.

[37]*Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

[38]*Herd*, 359 U.S. 297, 304 (1959) (internal quotes and citation omitted); *see* E. Allen Farnsworth, Contracts § 3.26 (2d ed. 1990) (requirement to negotiate in good faith is a departure from common law principles protecting the freedom of contract).

[39]Disney Reply at 3; Young Reply at 2.

[40]Network Affiliates Comments at 5; Fox Comments at 1; CBS Comments at 7.

[41]Disney Reply at 3; NAB Comments at 8-10; CBS Comments at 10-14.

commenters suggesting that the good faith bargaining requirement of Section 8(d) of the Taft-Hartley Act is the most appropriate source of guidance.[42] Section 8(d) of the Taft-Hartley Act details the collective bargaining duty of both employers and labor representatives, providing that:

> To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.[43]

There are significant parallels between the congressional policy goal of good faith negotiation underlying both Section 325(b)(3)(C) and Section 8(d) of the Taft-Hartley Act. In this regard, there is substantial National Labor Relations Board ("NLRB") precedent that the good faith negotiation requirement applies solely to the process of the negotiations and does not permit the NLRB to require agreement or impose terms or conditions on collective bargaining agreements. The Supreme Court has made this determination with force and clarity, stating that:

> It was recognized from the beginning that agreement might be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.[44]

23. Congress clearly did not intend the Commission to sit in judgement of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD. Even if the Commission had the resources to accomplish such a delegation, we can divine no intent in either the statute or its legislative history to achieve such a result. As commenters indicated, when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity.[45] Despite the arguments of the satellite industry and

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[42]We also look to the Commission's rules implementing the good faith negotiation requirement of Section 251 of the Communications Act, which also relies substantially on labor law precedent. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15577 (1996) ("*Interconnection Order*").

[43]National Labor Relations Act § 8(d), 29 U.S.C. § 158(d). One commenter asserts that the good faith negotiation requirement is analogous to the obligation created by a preliminary agreement between two parties, which requires them to make a good faith effort to reach a final agreement. In this type of agreement, "the parties are bound only to make a good faith effort to negotiate and agree upon terms and a final agreement; if they fail to reach such a final agreement after making good faith effort to do so, there is no further obligation." ALTV Comments at 15, quoting *Adjustrite Systems, Inc. et al. V. Gab Business Services et al.*, 145 F.3d 543 (2d. Cir. 1998).

[44]*H.K. Porter v. NLRB*, 397 U.S. 99, 103-04 (1970); *see NLRB v. American National Insurance Co.*, 343 U.S. 395 (1970).

[45]The example most often cited by commenters is the program access provisions of Section 628 of the Communications Act which requires the Commission to prohibit discriminatory prices, terms and conditions and unfair practices in the market for vertically integrated, satellite delivered cable programming. 47 U.S.C. § 548.

other MVPDs, we find nothing supporting a construction of Section 325(b)(3)(C) that would grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions or the interconnection requirements of Section 251 of the Communications Act. While the Commission generally will not intrude into the substance of particular retransmission consent negotiations and agreements, we note that Section 325(b)(3)(C) sanctions only those retransmission consent agreements containing different terms and conditions, including price terms, with different MVPDs if such different terms and conditions are based upon competitive marketplace considerations.

24. Having reached this conclusion, we do not interpret Section 325(b)(3)(C) as "largely hortatory"[46] as suggested by some commenters. As we stated in the Notice, "Congress has signaled its intention to impose some heightened duty of negotiation on broadcasters in the retransmission consent process."[47] In other words, Congress intended that the parties to retransmission consent have negotiation obligations greater than those under common law. Absent fraudulent intent, common law imposes no obligation on parties to negotiate in good faith prior to the formation of a contract. We believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.

B. Mutual Good Faith Negotiation Requirement

25. As a preliminary matter, we must determine to whom the "good faith" negotiation obligation applies. The Notice requested comment on whether the duty of good faith negotiation applies equally to the broadcaster and MVPD negotiating a retransmission consent agreement.[48] Several commenters assert that the good faith negotiation requirement is a mutual obligation and that the Commission must consider and weigh the conduct of the MVPD in assessing whether the broadcaster has failed to satisfy the good faith negotiation requirement.[49] Only DIRECTV asserts that the good faith negotiation requirement applies solely to broadcasters. DIRECTV argues that the language of Section 325(b)(3)(C) applies solely to "broadcast television stations" and in no way, express or implied, is imposed on MVPDs.[50]

26. We agree with DIRECTV that the language of Section 325(b)(3)(C) on its face applies only to "television broadcast station[s]."[51] To read the provision as a mutual obligation would contradict the express language of the statute and controvert Congress' intent. Moreover, Congress has demonstrated its ability to expressly impose a good faith negotiation obligation on

[46]NAB Comments at 16.

[47]Notice at ¶ 15.

[48]Notice at ¶ 15.

[49]Network Affiliate Comments at 17; Disney Comments at 8; ALTV Comments at 18; Fox Comments at 3; LTVS Reply at 8.

[50]DIRECTV Comments at 7, quoting 47 U.S.C. § 325(b)(3)(C)(ii).

[51]47 U.S.C. § 325(b)(3)(C).

both parties in other provisions of the Communications Act.[52] Accordingly, we conclude that the good faith negotiation requirement in Section 325(b)(3)(C) was intended to apply only to broadcasters. However, we caution MVPDs that seek retransmission consent that their conduct is relevant in determining whether a broadcaster has complied with its obligation to negotiate retransmission consent in good faith. Insistence by an MVPD on unreasonable terms and conditions or negotiating procedures will be taken into account by the Commission in assessing a broadcaster's observance of its good faith negotiation obligations.

C. Definition of Good Faith

27. The Notice sought comment on the criteria that should be employed to define "good faith" and sought comment on whether the Commission should explicitly define what constitutes good faith under Section 325(b)(3)(C).[53] The Notice requested comment on whether to adopt a two-part test for good faith similar to that embraced by the NLRB and by the Commission pursuant to Section 251 of the Communications Act.[54] The Commission also sought comment on any other specific legal precedent upon which we should rely and any other regulatory approach that might appropriately implement the good faith negotiation requirement of Section 325(b)(3)(C) of the Communications Act.[55]

28. Several commenters argue that both the NLRB and the Section 251 good faith negotiation regimes are based upon the premise that one party to the negotiation may not have an interest in reaching an agreement.[56] These commenters argue that, because broadcasters want their programming transmitted to the widest possible audience to increase advertising revenue and MVPDs desire valuable broadcast programming, both broadcasters and MVPDs have strong incentives for reaching retransmission consent.[57] Several commenters support a two-part test to determine good faith similar to that suggested in the Notice.[58] Fox asserts that, if the Commission

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[52]47 U.S.C. § 251(c)(1)("The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.").

[53]*Id.*

[54]Notice at ¶ 18.

[55]*Id.*

[56]NAB Comments at 10; Network Affiliate Comments at 8, 11; Disney Comments at 8; NAB Reply at 10, quoting *Interconnection Order*, 11 FCC Rcd 15499, ¶ 141 (emphasis added) ("ILECs stand only to lose by cooperating with new entrants and providing access to their facilities because providing interconnection '*reduce[s] the [ILECs] subscribership and . . . weaken[s] the [ILECs] dominant position in the market.*'"); Fisher Reply at 3.

[57]NAB Comments at 10; Network Affiliate Comments at 8; Disney Comments at 3; ALTV Comments at 9; NBC Comments at 6; Lin Reply at 2; Young Reply at 3. One commenter, BellSouth, asserts that broadcasters have strong incentives to enter into retransmission consent agreements with the dominant MVPD in the area, but the same incentives do not apply to alternative MVPDs. BellSouth Reply at 14; *see also* U S West Reply at 6. In addition, ACA asserts that broadcasters behavior is motivated solely by profit maximization and that in the current era of media conglomeration retransmission to the widest possible audience does not always generate the maximum profits. ACA Reply at 3.

[58]DIRECTV Comments at 6; EchoStar Comments at 10; LTVS Comments at 5; SBCA Comments at 4; ACA Comments at 16; RCN Reply at 5; Time Warner Reply at 11.

adopts a two-part test for determining good faith, the specific actions that would constitute lack of good faith should be "narrowly drawn to encompass only the most obvious and egregious breaches of good faith negotiating practices, and the Commission should always examine the factual context in which each alleged prohibition occurred."[59]

29. Time Warner proposes that the Commission adopt a "zone of reasonableness" standard for good faith in which, even if the broadcaster satisfies all of the procedural indicia of good faith, the Commission could determine that it violated its duty to negotiate in good faith "if it insists [on] a level of consideration that is so plainly uneconomic that an MVPD would suffer greater financial harm from accepting the broadcaster's terms than from refusing to carry the station."[60] NBC maintains that the Commission should contrive no standards before the fact.[61] Instead, to the extent standards are appropriate, they should be developed out of actual experience in adjudicated controversies.[62] Several commenters argue that the Commission should judge the conduct of the parties only by examining the totality of the circumstances.[63]

30. We will adopt a two part test for good faith negotiation as proposed in the Notice. We believe that this test best implements Congress' intent in adopting the good faith negotiation requirement. A two-part test follows well established precedent in the field of labor law. In addition, the Commission has used a similar test in implementing its statutory obligations under Section 251 of the Communications Act. Through the objective standards, this approach gives immediate guidance to the parties to retransmission consent negotiations that certain conduct will not be tolerated. Through the broader, totality of the circumstances test, the Commission will have the ability to prohibit conduct that, while not constituting a failure of good faith in all circumstances, does violate the good faith negotiation requirement in the context of a given negotiation. The totality of the circumstances test will also enable the Commission to continue refining and clarifying the responsibilities of parties to retransmission consent negotiations.

31. The first part of the test will consist of a brief, objective list of negotiation standards. Because the list consists of *per se* standards, of necessity, the standards must be concise, clear and constitute a violation of the good faith standard in all possible instances. Should an MVPD demonstrate to the Commission that a broadcaster, in the conduct of a retransmission consent negotiation, has engaged in actions violative of an objective negotiation standard, the Commission would find that the broadcaster has breached its duty to negotiate in good faith. We disagree with those commenters who assert that the Commission should only define violations on a prospective adjudicatory basis. Given the short, six-month, period in which satellite carriers have to negotiate retransmission consent before expiration of the compulsory license of Section 325(b)(2)(E), we believe it incumbent upon us to provide as much initial guidance as possible through which the parties may pursue negotiations.

[59]Fox Comments at 2.

[60]Time Warner Reply at 11. In such circumstances, asserts Time Warner, the broadcaster could establish that the terms are within the zone of reasonableness by providing evidence that a similarly situated MVPD has accepted terms that impose an equivalent economic burden. *Id.*

[61]NBC Comments at 7.

[62]NBC Comments at 7; Network Affiliate Comments at 10; *see* Fox Comments at 2 ("A list of specific *per se* behavioral prohibitions cannot adequately account for the factual context of a particular negotiation.").

[63]Disney Comments at 7; NCTA Comments at 4; LTVS Comments at 6; Young Reply at 3.

32. The second part of the test is a totality of the circumstances standard.[64] Under this standard, an MVPD may present facts to the Commission which, even though they do not allege a violation of the objective standards, given the totality of the circumstances reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitute a failure to negotiate in good faith. We do not intend the totality of the circumstances test to serve as a "back door" inquiry into the substantive terms negotiated between the parties. While the Commission will not ordinarily address the substance of proposed terms and conditions or the terms of actual retransmission consent agreements, we will entertain complaints under the totality of the circumstances test alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach a broadcaster's good faith negotiation obligation. However, complaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed by the Commission.

33. The Commission sought comment on specific actions or practices that would constitute *per se* violations of the duty to negotiate in good faith in accordance with Section 325(b)(3)(C).[65] In addition to any other actions or practices, the Commission asked commenters to address whether it would be appropriate to include in any such list provisions similar to the violations of the obligation to negotiate interconnection agreements in good faith set forth in Section 51.301 of the Commission's rules.[66] The Commission acknowledged, however, that the good faith standard of SHVIA is different in significant respects to that contained in Section 51.301 of the Commission's rules.[67]

34. Commenters proposed numerous standards that the Commission should consider in adopting rules to enforce the good faith negotiation requirement. Broadcasters generally argue that, to the extent it does anything, the Commission should adopt streamlined rules that apply only to the process of the negotiations between broadcasters and MVPDs. The other group, consisting of satellite carriers, small cable operators and alternative MVPDs, argues that the only way the Commission can effectively enforce the good faith negotiation requirement is to involve itself in the substantive terms of retransmission consent agreements as well as the process of negotiations. These commenters propose that the Commission adopt an extensive list of substantive terms and conditions that should be prohibited as violations of the obligation to negotiate retransmission consent agreements in good faith.

35. Broadcast commenters propose several standards based on experience gathered in the NLRB field, the absence of which indicates a lack of good faith, including: (1) a party must have a sincere desire to reach agreement,[68] (2) a party's negotiator must have authority to

[64]*See* Appendix B, § 76.65(b)(2).

[65]Notice at ¶ 18.

[66]*Id.*; 47 C.F.R. § 51.301(c)(1), (2), (3), (5), (6), (7), & (8).

[67]Notice at ¶ 18, n.40.

[68]Disney Comments at 5.

conclude a deal,[69] (3) a party must offer to meet at reasonable times and convenient places,[70] and (4) a party must agree to execute a written agreement once all terms have been agreed on.[71] NBC proposes that extrinsic evidence that a party never intended to reach agreement, or extrinsic evidence of an understanding with a third party that the negotiating party will not enter into a retransmission consent agreement, should also evidence violations of the good faith negotiation requirement.[72] Other commenters would prohibit a broadcaster from insisting on terms so unreasonable that they are tantamount to a refusal to deal.[73] EchoStar argues that such procedural violations are meaningless because "no bad faith actor would be so inept or so artless as to display its bad faith by not agreeing to a convenient time and place to meet, not appointing a representative to negotiate, and not committing to writing a retransmission agreement once a deal has been reached."[74]

36. DIRECTV proposes the following list of good faith negotiation standards based upon examples from labor law precedent, the Commission's program access rules, the interconnection provisions of the 1996 Act, and recognized marketplace dynamics. DIRECTV, supported by other commenters, proposes that, during the negotiation of a retransmission consent agreement, a broadcaster may not:

(a) intentionally seek to mislead or coerce the MVPD into reaching an agreement it would not otherwise have made;[75]

(b) unreasonably obstruct or delay negotiations or resolutions of disputes;[76]

(c) refuse to designate a representative with authority to make binding representations if such refusal significantly delays resolution of issues;[77]

(d) refuse to negotiate in fact;

(e) refuse to provide the satellite carrier with a high quality, direct feed of the broadcast signal;[78]

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[69]NAB Comments at 21; Disney Comments at 5; Hearst Reply at 4; NBC Reply at 8.

[70]NAB Comments at 21; Network Affiliate Comments at 15-16; Disney Comments at 7; NBC Comments at 8; Hearst Reply at 4; Fisher Reply at 5; LTVS Reply at 3.

[71]NAB Comments at 21; Disney Comments at 7; Time Warner Reply at 4-5; LTVS Reply at 3.

[72]NBC Reply at 8.

[73]NCTA Reply at 2; NBC Reply at 9.

[74]EchoStar Reply at 5; *see* RCN Reply at 4 (Good faith requires more than "a simple willingness to meet and the absence of a refusal to deal."); DIRECTV Reply at 6 ("Congress does not adopt such language without purpose.").

[75]*See also* LTVS Comments at 5; ACA Comments at 17.

[76]*See also* LTVS Comments at 5; ACA Comments at 17; NCTA Reply at 2; RCN Reply at 6.

[77]*See also* LTVS Comments at 5; ACA Comments at 17.

[78]*See also* EchoStar Comments at 13.

(f) engage in discrimination in the price, terms or conditions of retransmission consent afforded an MVPD relative to any other MVPD, unless such discrimination is related to "competitive marketplace conditions" as defined by the Commission . . .;

(g) offer unreasonable positions, including, but not limited to:

1. a unilateral requirement that retransmission consent for a given broadcast station be conditioned on carriage under retransmission consent of another broadcast station, either in the same or a different geographic market;[79]

2. a unilateral requirement that retransmission consent be conditioned on the exclusion of carriage under retransmission consent of other broadcast channels in a given market;

3. a unilateral requirement that retransmission consent be conditioned on a broadcaster obtaining channel positioning rights on the satellite carrier's system;[80]

4. a unilateral requirement that the satellite carrier (i) commit to purchase advertising on the broadcast station or broadcaster affiliated media, or (ii) that a specified share of advertising dollars spent in a broadcaster's market be spent on that broadcaster;

5. a unilateral requirement that retransmission consent be conditioned on a satellite carrier not retransmitting distant network signals to qualified subscribers in the market, or a satellite carrier "capping" the number of qualified subscribers in the market who may receive distant network signals, thus depriving eligible subscribers of their statutory right to subscribe to distant network signals;[81]

6. A unilateral requirement that retransmission consent be conditioned on the satellite carrier's carriage of digital signals.[82]

To this list EchoStar, would add: (i) insisting on an unreasonably short contract duration; (ii) threatening to run anti-satellite advertising; and (iii) refusal to deal, whether explicit or disguised

[79] *See also* EchoStar Comments at 12.

[80] *See also* EchoStar Comments at 13.

[81] *See also* EchoStar Comments at 12.

[82] DIRECTV Comments at 9-10 (citations omitted); *see also* EchoStar Comments at 12. Several commenters fully support the list of violations submitted by DIRECTV and EchoStar. SBCA Comments at 5; BellSouth Reply at 8. ACA also supports a good faith violation related to unilateral demands that an MVPD carry a broadcaster's digital signals. ACA Comments at 9; *but see* NAB Reply at 18 ("While the Commission has not yet ruled on a general must-carry mandate for digital signals, it would be absurd for the Commission to bar stations from using their own statutorily-granted right to retransmission consent as an incentive to encourage MVPDs to make their station's digital signals available to the maximum number of local viewers.").

under requests for extortionate terms.[83] Several commenters would include the imposition of non-optional tying arrangements requiring an MVPD to carry the affiliated programming of the broadcaster in exchange for retransmission consent.[84] Other commenters suggest a standard requiring parties to provide information necessary to reach agreement.[85]

37. Several commenters propose a standard prohibiting instances in which a broadcaster seeks higher consideration from an MVPD for any affiliated cable network programming in exchange for retransmission consent than it obtains from the incumbent cable operator, unless the broadcaster justifies that such higher consideration is cost-based or does not produce anti-competitive market conditions.[86] In addition, BellSouth urges the Commission to find a violation when a broadcaster ties retransmission consent to minimum subscriber penetration levels.[87] Another commenter would also brand as a good faith violation a demand of a nondisclosure agreement, a demand that the MVPD attest that the agreement complies with all applicable laws, or the refusal to include a provision permitting the agreement to be amended to reflect subsequent changes in the law.[88]

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[83]EchoStar Comments at 13. NAB asserts that there is no basis for the Commission to prevent broadcasters from voicing concerns in the media or through their own editorials or otherwise, about the status of retransmission consent negotiations. NAB Reply at 19.

[84]U S West Comments at 5-6; WCA Comments at 14-15; BellSouth Comments at 13; ACA Comments at 10; LTVS Reply at 3; EchoStar Reply at 15; Seren Reply at 5; RCN Reply at 4; Time Warner Reply at 5-8.

[85]LTVS Comments at 5; ACA Comments at 17. NAB asserts that the Commission should not require information exchanges as part of the bargaining process and argues that, although required in other contexts, such exchanges are not appropriate in the retransmission consent context because broadcasters have no obligation to enter into involuntary retransmission consent agreements. NAB Comments at 21-22.

[86]BellSouth Comments at 16-17; Seren Reply at 4-5; U S West Reply at 4; LTVS Reply at 4. WCA supports the reply comments the reply comments filed on behalf of BellSouth. WCA Reply at 1.

[87]BellSouth Comments at 17.

[88]ACA Comments at 17. ACA also urges the Commission to adopt the following violations applicable solely to small cable and MVPDs:

> [1] insisting that an MVPD carry either digital signals or other satellite cable programming in exchange for retransmission consent in contravention of the Commission's revised regulations.
>
> [2] Where a broadcaster's demands would result in a *de facto* exclusive retransmission consent agreement, refusing to offer the aggrieved smaller MVPD the same terms and conditions.
>
> [3] Refusing to deal with smaller MVPDs or their representatives, *e.g.*, buying cooperatives [and].
>
> [4] Failing to offer smaller MVPDs terms and conditions, including price terms, at least as favorable as those offered to competitors.

ACA Comments at 18.

38. Several broadcast commenters assert that the list of violations proposed by DIRECTV, EchoStar and others is so extensive and one-sided as to render any notion of equality at the bargaining table meaningless.[89] Other commenters assert that, since the adoption of the 1992 Cable Act, carriage of additional programming as compensation for retransmission consent is most often the compensation agreed upon by broadcasters and MVPDs in their retransmission consent agreements. Disney argues that the legislative history of the 1992 Cable Act expressly endorsed such compensation and that, had Congress wished to prohibit the practice, it would have done so expressly.[90] Disney further argues that no commenter offers a sustainable legal basis for presuming on a blanket basis that a request for additional programming carriage as consideration for retransmission consent would be illegal under current law or anti-competitive.[91]

39. Consistent with our determination that Congress intended that the Commission should enforce the process of good faith negotiation and that the substance of the agreements generally should be left to the market, we will not adopt the suggestions of certain commenters that we prohibit proposals of certain substantive terms, such as offering retransmission consent in exchange for the carriage of other programming such as a cable channel, another broadcast signal, or a broadcaster's digital signal.[92] Instead, we believe that the good faith negotiation requirement of SHVIA is best implemented through the following standards derived from NLRB precedent, commenter's proposals and the Section 251 interconnection requirements. These standards are intended to identify those situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties.

40. First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Section 325(b)(3)(C) affirmatively requires that broadcasters negotiate retransmission consent in good faith.[93] This requirement goes to the very heart of Congress' purpose in enacting the good faith negotiation requirement. Outright refusal to negotiate clearly violates the requirement of Section 325(b)(3)(C). Broadcasters must participate in retransmission consent negotiations with the intent of reaching agreement. Provided that the parties negotiate in good faith in accordance with the Commission's standards, failure to reach agreement does not violate Section 325(b)(3)(C).[94] Given the economic incentive for each side to reach agreement,

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[89]Post Reply at 3-5; Fisher Reply at 5.

[90]Disney Reply at 7-8, quoting S. Rep. No. 102-92, 102nd Cong., at 35-36 (1991) ("Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, *or the right to program an additional channel on the cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.*") (emphasis Disney).

[91]Disney Reply at 9; Lin Reply at 4.

[92]As described below, Section 325(b)(3)(C) sanctions only those retransmission consent agreements containing different terms and conditions, including price terms, with different MVPDs if such different terms and conditions are based upon competitive marketplace considerations. *See infra* ¶ 56, discussing bargaining proposals that are consistent with competitive marketplace considerations.

[93]*See* Appendix B, § 76.65(b)(1)(A).

[94]*See supra* n. 32 and accompanying text (colloquy between Representatives Tauzin and Dingell) ("as long as a station does not refuse to deal with any particular distributor, a station's insistence on different terms and conditions in retransmission agreements based on marketplace considerations is not intended to be

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we are hopeful that such impasses will be rare and short-lived.

41. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues.[95] Failure to appoint a negotiating representative vested with authority to bargain on retransmission consent issues indicates that a broadcaster is not interested in reaching an agreement. This standard is the norm in NLRB precedent as well as our interconnection rules implementing Section 251.[96] This requirement does not empower MVPDs to demand that specific officers or directors of a broadcaster attend negotiation sessions. Provided that a negotiating representative is vested with the authority to make offers on behalf of the broadcaster and respond to counteroffers made by MVPDs to the broadcaster, this standard is satisfied.

42. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations.[97] Refusal to meet at reasonable times and locations belies a good faith intent to negotiate. This requirement does not preclude negotiations conducted via telephone, facsimile, or by letter. Reasonable response times and unreasonable delays will be gauged by the breadth and complexity of the issues contained in an offer. The Commission is aware that, in many cases, time will be of the essence in retransmission consent negotiations, particularly as we approach the end of the six-month period provided for in Section 325(b)(2)(E) – May 29, 2000. We advise broadcasters that, in examining violations of this standard, we will consider the proximity of the termination of retransmission consent and the consequent service disruptions to consumers. At the same time, we caution MVPDs that waiting until the eleventh hour to initiate negotiations will also be taken into account in enforcing this standard.

43. Fourth, a broadcaster may not put forth a single, unilateral proposal and refuse to discuss alternate terms or counter-proposals.[98] "Take it, or leave it" bargaining is not consistent with an affirmative obligation to negotiate in good faith. For example, a broadcaster might initially propose that, in exchange for carriage of its signal, an MVPD carry a cable channel owned by, or affiliated with, the broadcaster. The MVPD might reject such offer on the reasonable grounds that it has no vacant channel capacity and request to compensate the broadcaster in some other way. Good faith negotiation requires that the broadcaster at least consider some form of consideration other than carriage of affiliated programming. This standard does not, in any way, require a broadcaster to reduce the amount of consideration it desires for

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prohibited by this bill . . . if a station negotiates in good faith with a distributor, the failure to reach an agreement with that distributor would not constitute a discriminatory act that is intended to be barred by this section."); *Candide Productions Inc. v. Int'l Skating Union*, 530 F. Supp. 1330, 1337 (S.D.N.Y. 1982) ("A commitment to good faith negotiation does not carry with it a surrender of one's right to decide not to enter into another contract with a party."); *supra* n. 43 and accompanying text, discussing Section 8(d) of the Taft-Hartley Act (". . . such obligation does not compel either party to agree to a proposal or require the making of a concession.").

[95] *See* Appendix B, § 76.65(b)(1)(B).

[96] 47 C.F.R. § 51.301(c)(7); *see Cablevision Industries*, 283 NLRB 22 (1987).

[97] *See* Appendix B, § 76.65(b)(1)(C).

[98] *See* Appendix B, § 76.65(b)(1)(D).

carriage of its signal. This standard only requires that broadcasters be open to discussing more than one form of consideration in seeking compensation for retransmission of its signal by MVPDs.

44. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide reasons for rejecting any aspects of the MVPD's offer.[99] Blanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation. This provision merely ensures that MVPDs are not negotiating in a vacuum and understand why certain terms are unacceptable to the broadcaster so that the MVPD can respond to the broadcaster's concerns. We reiterate that good faith negotiation requires a broadcaster's affirmative participation. However, this standard is not intended as an information sharing or discovery mechanism. Broadcasters are not required to justify their explanations by document or evidence.[100]

45. Sixth, a broadcaster is prohibited from entering into an agreement with any party a condition of which is to deny retransmission consent to any MVPD.[101] For example, Broadcaster A is prohibited from agreeing with MVPD B that it will not reach retransmission consent with MVPD C. It is impossible for a broadcaster to engage in good faith negotiation with an MVPD regarding retransmission consent when it has a contractual obligation not to reach agreement with that MVPD.

46. Finally, once the parties reach agreement on the terms of retransmission consent, the broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement.[102] Because the Commission may be called upon in certain instances to determine whether the totality of the circumstances involved in the negotiation of a particular retransmission consent agreement complies with Section 325(b)(3)(C), it is vital that the parties reduce their entire agreement to writing. In addition, this requirement also minimizes subsequent misunderstandings between the parties related to their respective obligations.

47. We do not believe that we should at this time adopt further objective standards as proposed by the commenters.[103] In appropriate instances, we will consider the conduct at the

[99]*See* Appendix B, § 76.65(b)(1)(E).

[100]We recognize that in other contexts there is an information exchange requirement applicable to both parties as to claims made in the bargaining process. *See e.g. Teleprompter Corporation v. NLRB*, 570 F. 2d 4 (1st Cir. 1977); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). We do not believe it would be desirable to attempt to replicate such a requirement here because the parties are competitors and the information involved would, in most instances, be competitively sensitive. Because there is no mutuality of obligations under Section 325(b)(3)(C), the marketplace negotiation contemplated in SHVIA would be negated by a one-sided information disclosure requirement. *See Silverman v. Major League Baseball Player Relations Committee*, 516 F. Supp. 588, 594 (S.D. N.Y. 1981) ("Information concerning subjects at issue in bargaining is presumed to be necessary and relevant to negotiations, and *employers and unions alike* must provide such information when requested in the course of bargaining.") (emphasis added). Thus, although broadcasters must provide reasons for the positions taken, we impose no general requirement that confidential information be made available to support negotiating positions taken.

[101]*See* Appendix B, § 76.65(b)(1)(F).

[102]*See* Appendix B, § 76.65(b)(1)(G).

[103]*See e.g., supra* nn. 75-88 and accompanying text, discussing proposed limitations on good faith negotiation suggested by certain commenters.

heart of such proposed standards when we examine a particular retransmission consent negotiation under the totality of the circumstances test.

48. The Notice further observed that Section 325(b)(3)(C) provides that:

> it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.[104]

The Notice sought comment on what constitutes a competitive marketplace consideration.[105] The Notice also observed that the Commission has adopted non-discrimination standards in both the program access and open video system contexts and sought comment on the relevance, if any, of these standards to what constitutes a "competitive market consideration." [106] In addition, the Notice sought comment on any other factors or approaches to determining what constitutes competitive marketplace considerations under Section 325(b)(3)(C).[107]

49. A number of commenting parties urge that the competitive marketplace considerations language be interpreted as a requirement that the Commission judge the good faith of all retransmission consent offers based on whether they are based on "competitive marketplace considerations." DIRECTV and EchoStar, for example, claim that competitive marketplace considerations would permit a broadcaster to discriminate between providers only in scenarios where Congress and the Commission have recognized that certain variance in price, terms or conditions correspond to legitimate behavior that may occur in the marketplace for video programming.[108]

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[104]Communications Act § 325(b)(3)(C), 47 U.S.C. §325(b)(3)(C)(ii).

[105]Notice at ¶ 19. The Notice observed that on the subject of "competitive marketplace considerations," Senator Kohl commented that:

> . . . there may be some disagreement as to what exactly this new provision means. At the very least, "competitive marketplace considerations" may simply be interpreted as the normal, everyday jostling that takes place in the business world. At the very most, a "competitive marketplace" would tolerate differences based upon legitimate cost justifications, but not anti-competitive practices such as illegal tying and bundling. The answer probably lies somewhere between these two interpretations and we trust the sometimes confused [Commission], as we often do, to properly divine the real intent of a sometimes confused Congress.

145 Cong. Rec. S15017 (daily ed. Nov. 19, 1999) (statement of Sen. Kohl).

[106]Notice at ¶ 19; *see* 47 C.F.R. § 76.1002(b) (program access standard); 47 C.F.R. § 76.1503(a) (open video system standard).

[107]Notice at ¶ 19.

[108]DIRECTV Comments at 13-14; EchoStar Comments at 18. Several commenters assert that the Commission's program access and open video system rules provide an ideal model and suggest that only

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50. EchoStar asserts that, generally where a broadcaster has received any consideration for retransmission consent, it has been non-monetary, carriage of cable networks affiliated with the broadcaster, and argues that:

> The general rule, therefore, should be that broadcaster demands deviating from that formula, such as demands for money, demands for carriage of additional cable networks beyond those involved in the retransmission-for-carriage agreements with cable operators, or demands for retransmission of additional broadcast stations (beyond those owned and operated by the same network), should be presumptively viewed as *not* based on competitive marketplace considerations.[109]

51. NAB argues that satellite carriers are not nascent businesses that need government protection, but instead are well-financed, powerfully-backed competitors in the multichannel marketplace.[110] Commenters argue that satellite companies not only use local stations to increase the attractiveness of their overall product, but also sell the stations to viewers at substantial prices.[111] One commenter notes that the fact that satellite carriers are able to charge a fee for retransmitted local signals demonstrates that these signals have value for which

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the following acts or practices constitute competitive marketplace considerations that a broadcaster may take into account in negotiating retransmission consent agreements:

> Reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality; and
>
> Different prices, terms, and conditions to take into account actual, verifiable differences in the costs of delivering the programming.

DIRECTV Comments at 13-14; LTVS Comments at 6; WCA Comments at 14; BellSouth Reply at 10; EchoStar Comments at 18; SBCA Comments at 5.

[109]EchoStar Comments at 17 (emphasis original); *see* SBCA Comments at 3; *see also* EchoStar Ex Parte at 3-5; *but see* ALTV Reply at 3 (Congress "expressly overlayed the compulsory [copyright] license with the retransmission consent requirement to assure that stations do get payment for their signals commensurate with the value to the MVPD using the signal.").

[110]NAB Reply at 5-7.

[111]In Washington, D.C., for example, DIRECTV charges $5.99 for a total of five broadcast channels ($1.20 per station, per month), four of which are the local outlets for the four major networks (ABC, CBS, Fox, and NBC). *See* NAB Comments at 13-14; NBC Comments at 3. DIRECT and EchoStar each currently offer local signals in more than 17 markets, including Boston, Chicago, Dallas, Denver, Los Angeles, Miami, New York, Philadelphia, San Francisco, and Washington, D.C. NBC Comments at 3. Similarly, EchoStar charges $4.99 for the four major network affiliates in Washington ($1.25 per station, per month). *See* NAB Comments at 14; ALTV Comments at 6; NBC Comments at 3. Commenters observe that these prices are substantially higher than the average price DIRECTV and EchoStar charge for most other channels – DIRECTV charges approximately 47 cents per channel and EchoStar charges approximately 45 cents per channel. *See* NAB Comments at 14; Network Affiliates Reply at 11 (EchoStar charges its customers 180% more, and DIRECTV 160% more for local broadcast stations than for non-broadcast channels).

broadcasters must be compensated.[112] EchoStar counters that "the only reason . . . consumers purchase a satellite carrier's local signal offering is for value that the satellite carrier provides, including increased quality, convenience, and aesthetics (*i.e.*, lack of off-air antenna)."[113]

52. Commenters assert that, in the early 1990s, when the retransmission consent provisions of the 1992 Cable Act first became effective, cable systems were effectively the only distributors from whom broadcasters could seek consideration through retransmission consent. Broadcasters assert that they were at a tremendous disadvantage because only a single buyer was prepared to bid for their product.[114] Broadcast commenters state that, today, the existence of multiple MVPDs in at least some markets creates a more competitive marketplace for the sale of retransmission rights, and one that provides more opportunity for stations seeking to obtain compensation for granting these valuable rights.[115] NAB states that the existence of multiple buyers is obviously a very important competitive marketplace consideration in this market, as in any market.[116] EchoStar counters that multiple competitors in a market only serve to increase a broadcaster's ability to play one MVPD distributor against another in retransmission negotiations, an ability Congress sought to restrain by imposing the good faith and competitive marketplace considerations requirements on retransmission consent.[117]

53. As discussed above, we do not believe, as a general matter, that Section 325(b)(3)(C) was intended to subject retransmission consent negotiation to detailed substantive oversight by the Commission or indeed that there exist objective competitive marketplace factors that broadcasters must ascertain and base any negotiations and offers on. Indeed, in the aggregate, retransmission consent negotiations are the market through which the relative benefits and costs to the broadcaster and MVPD are established. Although some parties earnestly suggest, for example, that broadcasters should be entitled to zero compensation in return for retransmission consent or that the forms of compensation for carriage should be otherwise limited, this seems to us precisely the judgment that Congress generally intended the parties to resolve through their own interactions and through the efforts of each to advance its own economic self interest.[118]

54. EchoStar suggests an economic paradigm against which retransmission terms might be compared to determine if they are based on "competitive marketplace considerations." It suggests that in the ideal competitive market setting, revenues will be just sufficient to compensate providers for the costs of program creation, duplication, and distribution so that all

[112]Hearst Reply at 4.

[113]EchoStar Reply at 13.

[114]NAB Comments at 17; ALTV Comments at 13.

[115]NAB Comments at 17; ALTV Comments at 10; NBC Reply at 2; *but see* EchoStar Ex Parte at 3-5 (retransmission marketplace not as competitive as broadcasters claim).

[116]NAB Comments at 18.

[117]EchoStar Reply at 8.

[118]*See supra* nn. 75-88 and accompanying text, discussing proposed limitations on good faith negotiation suggested by certain commenters.

participants are earning a fair rate of return.[119] Further, having already noted that the marketplace may be distorted through the exercise of market power by cable operators, EchoStar urges that retransmission consent term outcomes for the cable industry provide a benchmark or threshold that should not be exceeded in the case of satellite carriage of broadcast signals.[120] Further, it asserts that considerations extracted from certain cable operators (for example carriage of digital signals) would be inappropriate and not based on competitive marketplace consideration if they were significantly costlier to accede to for satellite carriers.[121]

55. In our view this type of regulatory analysis and comparison is not what was intended through the enactment of Section 325(b)(3)(C). It is both internally inconsistent and not capable of administration in any reasonably timely fashion. The proposal is internally inconsistent in that it acknowledges that among the market participants, cable operators might be the most likely to have market power. If this were the case, using their negotiations as a proxy for a competitive market setting would not be logical. Under this analysis, broadcasters, already the hypothesized victims of an exercise of market power, would be obligated to continue in that role with other participants in the market. Further, EchoStar finds one of the most common features of these agreements – payment for carriage through the devotion of channel capacity to other affiliated services – presumptively a measure of bad faith. Acceptance of the cash rate but not the other currency of the negotiation could hardly be a replication of a competitive market. Even if these problems could be overcome, however, it seems unlikely that the data needed to measure a transaction against the economic model proposed would be available either to the parties in the course of their negotiations or to the Commission in the course of trying to judge their compliance with the standard of review proposed.[122]

[119]Comments of James N. Dertouzas at 3.

[120]*Id.* at 4-5.

[121]*Id.*

[122]As part of its effort to describe a competitive marketplace against which satellite retransmission consent terms might be compared to determine compliance with the requirements of Section 325(b)(3)(C), EchoStar presents what is described as a "simple model" to illustrate some of the competitive considerations facing broadcasters. According to this model:

> In providing distant signals, B_1 represents the value to a broadcaster (in terms of advertising) of a household that does not subscribe to MVPD services. B_2 represents the value to a broadcaster of a household that subscribes to MVPD services when the television signal is only available over-the-air. B_3 represents the value to a broadcaster of a household that subscribes to MVPD services when the signal is carried by the operator. P_1 represents the proportion of the population that does not subscribe to MVPD services in the absence of carriage. P_2 represents the proportion of the population that does subscribe to MVPD services in the absence of carriage, and s represents the percentage of non subscribers who shift when the over-the-air signals are made available on the MVPD menu of services. The gain to the broadcaster is thus $- (B_1 - B_3)sP_1 + (B_3 - B_2)P_2$. The first term represents the loss in value from those households who shift to MVPD services. This loss is larger when many households shift and when ratings and advertising revenues are diverted to services only available via the MVPD offerings. The second term represents a gain that is larger when the percentage of subscribers is large and the broadcast ratings are significantly greater after the signals are carried by the MVPD operator.

(...continued)